In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 838

WYANDOTTE TRANSPORTATION CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Although we believe that the decision below is correct, we do not oppose the petition. There is a direct conflict between the instant case and *United States* v. *Zubik*, 295 F. 2d 53 (C.A. 3), and *United States* v. *Bethlehem Steel Corp.*, 319 F. 2d 512 (C.A. 9), certiorari denied, 375 U.S. 966. Moreover, the issue involved—whether the cost of removing vessels negligently sunk in the navigable waters of the United States must be borne by the tortfeasor rather than

the public Treasury—is an important and recurring one.

1. The decision below involves two separate cases consolidated by the district court. In one (*United States* v. *2,220,000 Pounds Chlorine Cargo, etc., et al.*), a barge laden with liquid chlorine under pressure sank in the Mississippi River on March 23, 1961, while being push-towed, and her owner notified the Army Corps of Engineers that it abandoned the barge. In view of the potential menace of over two million pounds of chlorine gas escaping from the barge's tanks, President Kennedy proclaimed the sinking a major disaster and directed that the tanks be removed. The chlorine-laden tanks were then removed from the river bed through the concerted efforts of civil defense, public health, and State authorities at a cost to the government of approximately $3,081,000. Alleging negligence in the construction, condition, and towing of the chlorine barge, the government brought suit to recover the costs of removal against the cargo, its consignee and the owners of the chlorine barge and the tugboat that was pushing it when the sinking occurred.

In the other case (*United States* v. *Cargill, Inc., et al.*), the barges L1 and M65 were struck by a supertanker during the early morning hours of March 31, 1961, and sank in the Mississippi River. The owners and charterers of the barges marked them for day and night navigation; they then notified the Corps of Engineers that they abandoned the vessels and deemed the government their owner. The government refused to accept the abandonment. Thereafter,

alleging negligence in the condition and mooring of the barges, the government sued their owners, managers, charterers, and insurers to have them decreed liable for the removal of the barges.

The district court entered summary judgment against the United States in each action on the ground that "the only right * * * that the United States Government has to recover its expenses is a right in rem against the vessels themselves" (Pet. App. 17). The Fifth Circuit reversed and remanded for trial on the issue of petitioners' negligence.[1] The court noted that Section 10 of the Rivers and Harbors Act of 1899 (30 Stat. 1151, 33 U.S.C. 403) prohibits "the creation of any obstruction" to navigation, and that Section 15 (33 U.S.C. 409) specifically makes it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." Relying, *inter alia*, on *United States* v. *Republic Steel Corp.*, 362 U.S. 482, the court held that implicit in these statutory prohibitions are the necessary remedies—injunction or money damages—to place on tortfeasors the burden of removing vessels sunk as the result of their negligence. The court rejected petitioners' principal argument that Section 15 of the Act permits the abandonment with impunity of negligently sunk vessels, stating that "the correct reading of the statute allows only

[1] On the petition for rehearing of the consignee of the chlorine cargo, the court of appeals affirmed the summary judgment entered in its favor on the ground that "there are no allegations or proof of negligence" on its part (Pet. App. C).

an innocent owner to abandon his ship and that a negligent party must raise the vessel or pay for its removal" (Pet. App. 31).[2]

2. The decision below is in direct conflict with decisions of the Third and Ninth Circuits. In *United States* v. *Zubik*, 295 F. 2d 53 (C.A. 3), the government sued the owner of a negligently sunk vessel to recover the costs expended in raising the wreck. While recognizing in *dictum* (*id.* at 56) that the government may obtain an injunction to compel removal of a sunken vessel, the court of appeals read the Rivers and Harbors Act as limiting the government's right to monetary relief to an *in rem* proceeding against the vessel itself. In *United States* v. *Bethlehem Steel Corp.*, 319 F. 2d 512 (C.A. 9), the government was denied an injunction to compel the removal of a negligently sunk ship by her owner and charterer. Although acknowledging that Section 15 of the Rivers and Harbors Act prohibits the negligent sinking of a vessel, the court of appeals (Judge Browning dissenting) read this section as conferring on a negligent shipowner the absolute right to limit his liability for removing the vessel to his interest in the vessel.[3]

---

[2] In view of its decision that the Rivers and Harbors Act implicitly afforded the relief requested, the court did not reach the government's alternative argument that it was entitled to the requested relief under the common law and maritime law. In the event that certiorari is granted, the United States reserves the right to renew this argument as an additional basis for affirmance of the judgment below.

[3] We do not agree with petitioners' claim (Pet. 7, 10-11) of a conflict between the decision below and the decisions in *China Union Lines, Ltd.* v. *A. O. Andersen & Co.*, 364 F. 2d

3. Although we do not oppose certiorari, we note briefly our reasons for believing that the decision below is correct. Section 10 of the Act prohibits the creation of "any obstruction" in the navigable waters of the United States, and Section 15 more particularly prohibits the sinking of a vessel. The final clause of Section 15—that "* * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * *"—upon which petitioners rely, does not confer on a negligent shipowner the absolute right to limit his liability to his interest in the sunken vessel by abandoning it. Rather, under the traditional principles of admiralty law (see, *e.g.*, the Limitation of Liability

---

769 (C.A. 5), and *United States* v. *Wilson*, 235 F. 2d 251 (C.A. 2). In the *China Union* case, the government sought (and was granted) relief solely *in rem* against the vessel; it did not seek recovery *in personam*. The statement in the court's opinion that "* * * the Government could not proceed *in personam* against China Union * * *" (*id.* at 792) is *dictum*. In *Wilson*, the United States sought by injunction to compel the removal of a sunken barge from the Hudson River. The court implicitly held that the barge was an "obstruction" prohibited by Section 10, 33 U.S.C. 403, but also held that injunctive relief was available only under Section 12 of the Act, 33 U.S.C. 406, and that that section's reach was confined to the enjoining of "structures." The latter holding has in effect been overruled by the subsequent decision of this Court in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, that injunctive relief is not limited to the removal of "structures" and that the right to an injunction against any "obstruction" is implied in the Act.

Act of 1851, 9 Stat. 635, as amended, 46 U.S.C. 182, *et seq.*), only an innocent vessel owner may limit his liability to the vessel; one who intentionally or negligently sinks his vessel may not. Moreover, the final clause of Section 15 may not be read as conferring any rights stemming from an abandonment on tortfeasors other than the vessel owner—such as the charterers of the barges and the tugboat owner in these cases. Accordingly, under this Court's decision in *United States* v. *Republic Steel Corp., supra*, 362 U.S. 482, an injunction to compel petitioners to remove the sunken barges L1 and M65 would properly issue. And, by analogy, an award of monetary damages is appropriate where the government, because of the exigencies of the matter, has itself removed the obstruction. See *United States* v. *Perma Paving Co.*, 332 F. 2d 754 (C.A. 2).

4. That the issue is a recurring one is apparent from the cases to which we have already made reference. In addition, we note the pending case of *In the Matter of Marine Leasing Services, Inc.* (E.D. La., Admiralty No. 869) in which the government seeks to recover $1,757,500 expended in connection with the removal of six hundred tons of liquid chlorine under pressure from another barge, alleged to have been negligently sunk in the Mississippi River in September 1965. The increasing amount of traffic on navigable waters and the increasing size of vessels and their cargoes make it predictable that the issue will continue to arise.

For the foregoing reasons, the United States does not oppose the petition for a writ of certiorari.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
MARTIN JACOBS,
Attorneys.

JANUARY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 243772 544